IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED

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CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS

MARY ANN RANDOLPH on behalf of Herself and all other similarly situated,	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. SA-01-CA-0699-FB
OXMOOR HOUSE, INC.,	§	
Defendant.	§	

ORDER ACCEPTING IN PART THE REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

The Court has considered the Report and Recommendation of the United States Magistrate Judge, filed in the above styled and numbered cause on July 18, 2002 (docket #21); Defendant, Oxmoor House, Inc.'s Objections (docket #22), and Objection to the Report and Recommendation filed by the plaintiff (docket #23).

Where no party has objected to a Magistrate Judge's Report and Recommendation, the Court need not conduct a de novo review of them. See 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings and recommendations to which objection is made."). In such cases, the Court need only review the Report and Recommendation and determine whether they are either clearly erroneous or contrary to law. United States v. Wilson, 864 F.2d 1219, 1221 (5th Cir.), cert. denied, 492 U.S. 918 (1989).

On the other hand, any Report or Recommendation to which there are objections requires de novo review by the Court. Such a review means that the Court will examine the entire record,

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and will make an independent assessment of the law. The Court need not, however, conduct a de novo review when the objections are frivolous, conclusive, or general in nature. Battle v. United States Parole Commission, 834 F.2d 419, 421 (5th Cir. 1987).

At issue in this case is whether this Court should follow the unpublished decision in Crosley v. Lens Express, Inc., NO. CIV. A. SA00-CA385EP, 2001 WL 650728 (W.D. Tex. Feb. 12, 2001). Plaintiff argues that Crosley controls the disposition of defendant's motion to dismiss while defendant argues Crosley was wrongly decided and should not be followed. In the Report and Recommendation, United States Magistrate Judge Pamela Mathy recognized she is bound to follow a prior decision of a district judge in this Division just as district judges in this Division are bound to follow the holdings of the Fifth Circuit Court of Appeals. She also recognized that a decision of a district judge is persuasive authority but not necessarily binding precedent to another district judge in this Division. Therefore, in response to defendant's argument that Crosley was "wrongly decided"[1], Magistrate Judge Mathy's Report considered:

> the central arguments that militate against implying a private right of action to enforce section 3009, in sum: the failure of the statute or the legislative history to expressly provide for a lawsuit filed by a private individual; the FTC's administrative scheme; and the state of federal and state law at the time the law was enacted.

Based upon her consideration of the arguments, the Magistrate Judge provided alternative recommendations to this Court—recommendations in the event the Court decides to follow Crosley, and recommendations should this Court find to the contrary. Defendant objects to Judge Mathy's conclusions and recommendations to the extent she suggests this Court should follow the

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[1] The Crosley case ended in settlement.

Crosley v. Lens Express, Inc. decision. Defendant believes Crosley was wrongly decided in light of recent cases from the United States Supreme Court and the Fifth Circuit and therefore, should not be followed. Defendant contends that it is this Court's task to interpret the statute Congress passed to determine whether it displays an intent to create not just a private right, but also a private remedy. Defendant maintains the Fifth Circuit has recognized that the presumption is that Congress did not intend to create a private right of action and as a result, plaintiff bears a relatively heavy burden of demonstrating that Congress affirmatively contemplated private enforcement when it passed the statute in issue.[2] Defendant also notes, and Judge Mathy points out in her Report, that the parties agree the statute at issue here does not expressly provide a private right of action nor does the legislative history expressly state whether or not a private right of action is created. The statute provides as follows:

> (a) Except for (1) free samples clearly and conspicuously marked as such, and (2) merchandise mailed by a charitable organization soliciting contributions, the mailing of unordered merchandise or of communications prohibited by subsection (c) of this section constitutes an unfair method of competition and an unfair trade practice in violation of section 45(a)(1) of title 15.[3]

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[2] This standard was recently reiterated by the Fifth Circuit as follows:

> A plaintiff asserting an implied right of action under a federal statute bears the relatively heavy burden of demonstrating that Congress affirmatively contemplated private enforcement when it passed the statute. In other words, he must overcome the familiar presumption that Congress did not intend to create a private right of action.

Casas v. American Airlines, Inc., Nos. 00-41137, 00-41270, 2002 WL 2002686, at *2 (5th Cir. Sept. 17, 2002) (to be published in F.3d). The Fifth Circuit also recognized that even if the plaintiff can demonstrate membership in a class to whom the statute has conferred a substantive right, "the crucial inquiry remains whether Congress actually intended to create a private remedy." Id. at *3. The court stated that "Alexander v. Sandoval, [532 U.S. 275, 293 n.8 (2001) and decided April 24, 2001, after the February 12, 2001 opinion in Crosley] makes clear that '"affirmative" evidence of congressional intent must be provided for an implied remedy, not against it, for without such intent "the essential predicate for implication of a private remedy simply does not exist."'"

[3] 15 U.S.C. § 45(a)(1) provides:

> Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(b) Any merchandise mailed in violation of subsection (a) of this section, or within the exceptions contained therein, may be treated as a gift by the recipient, who shall have the right to retain, use, discard, or dispose of it in any manner he sees fit without any obligation whatsoever to the sender. All such merchandise shall have attached to it a clear and conspicuous statement informing the recipient that he may treat the merchandise as a gift to him and has the right to retain, use discard, or dispose of it in any manner he sees fit without any obligation whatsoever to the sender.

(c) No mailer of any merchandise mailed in violation of subsection (a) of this section, or within the exceptions contained therein, shall mail to any recipient of such merchandise a bill for such merchandise or any dunning communications.

(d) For purposes of this section, "unordered merchandise" means merchandise mailed without the prior expressed request or consent of the recipient.

39 U.S.C. § 3009. Although the court in Crosley found the language allowing recipients of unordered goods to keep them as gifts in subsection (b) above implied the ability to enforce such a right, this Court finds that based on the "alternative analysis" contained in the Report and Recommendation, the defendant's objections, and the guidance on implied rights of action in the more recent decisions in Casas v. American Airlines, Inc., Nos. 00-41137, 00-41270, 2002 WL 2002686, at *2 (5th Cir. Sept. 17, 2002) (to be published in F.3d), and Gonzaga Univ. v. Doe, 122 S. Ct. 2268 (2002), it will not follow the Crosley decision and concludes there is no evidence Congress intended to imply a private right of action as plaintiff contends.

The alternative analysis by Magistrate Judge Mathy in her Report and Recommendation upon which this Court relies is as follows:

> "The question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction." Transamerica

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Subsection (a)(2) provides that "[t]he Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(2).

Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15 (1979) ("TAMA"). The Court must determine "whether Congress intended to create the private remedy," beginning with "the language of the statute itself. Id.; see also California v. Sierra Club, 451 U.S. 287, 293 (1981) ("Cases subsequent to Cort have explained that the ultimate issue is whether Congress intended to create a private right of action."); Sigmon v. Southwest Airlines Co., 110 F.3d 1200, 1205 (5th Cir.), cert. denied, 522 U.S. 950 (1997); Hondo Nat'l Bank v. Gill Savings Ass'n, 696 F.2d 1095, 1098 (5th Cir. 1983). The Fifth Circuit "has recognized a **presumption** that Congress did not intend to create a private right of action....[Plaintiffs]' bear [] the relatively heavy burden of demonstrating that Congress affirmatively contemplated private enforcement when it passed the relevant statute." Sigmon, 110 F.3d at 1205 (citations omitted) (emphasis added).

Crosley found "no explicit indication, in either section 3009 itself or its legislative history that Congress intended to create a private cause of action." Crosley v. Lens Express, Inc., No. CIV.A. SA00CA385EP, 2001 WL 650728 at *2 (W.D. Tex. Feb. 12, 2001) (emphasis added). The parties agree that the statute does not expressly create a private right of action and the legislative history does not expressly state whether or not a private right of action is created by the statute. The Fifth Circuit has stated: "The Supreme Court forewarns that in cases where the statutes and legislative history are silent on the question of a private remedy, 'implying a private right of action on the basis of congressional silence is a hazardous enterprise at best.'" Till v. Unifirst Federal Savings & Loan Assoc., 653 F.2d 151, 160 (5th Cir. 1981) (citing Touche v. Ross & Co. v. Redington, 442 U.S. 560, 571 (1975)). The portions of the legislative history cited to the Court include the comments of Senator Magnuson at the time of Congress' consideration of section 3009 that "[f]ifteen states have now moved to bring under control the unconscionable practice of persons who ship unordered merchandise to consumers and then trick or bully them into paying for it." 116 Cong. Rec. at 22314 (June 30, 1970).[4] Senator Magnuson's remarks indicate Congress was aware that some states had passed laws to protect consumers from the practice.[5] Senator Magnuson's remarks do not indicate that Congress intended to provide a private individual the right to sue in federal court under section 3009. See also Kaiser v. U.S. Postal Service, 908 F.2d 47, 51 (6th Cir. 1990), cert. denied, 498 U.S. 1025 (1991) (refusing to imply a private right of action based on labor rights in the Postal Reorganization Act, 39 U.S.C. § 3006 titled "right of transfer," because

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[4] Both sides have cited this same portion of legislative history to the Court. Docket no. 14 at 9-10; docket no. 16 at 7.

[5] Defendant states that the statutes in Texas, Florida and Michigan do not provide for any specific private right, but statutes enacted in New York in 1966 and California in 1969 and 1971 specifically created private causes of action for injunctive relief and attorney's fees (docket no. 14 at 9-10 and n.9).

legislative history is devoid of any intent to imply a right of action); Blaze v. Payne, 819 F.2d 128, 130 (5th Cir. 1987) (same); Gaj v U.S. Postal Service, 800 F.2d 64, 68-69 (3rd Cir. 1986) (same). The Conference Report to the Public Law 91-375 indicates only that the Senate amendment contained a provision not in the original House bill

> providing that mailing of unordered merchandise, with certain exceptions, constitutes an unfair method of competition and an unfair trade practice in violation of the Federal Trade Commission Act and may be treated as a gift by the recipient. The conference substitute adopts the Senate provision.

CONF. REP. DOC. NO. 91-1363 (Aug. 3 1970), reprinted in 1970 U.S.C.C.A.N. at 3721 (91st Cong., 2d Sess.). This language provides no support for concluding Congress intended to provide a private right of action.

Crosley also found, with reference to "the spare language of" section 3009, that "if section 3009 had ended with subsection (a), it could not be said to create a private cause of action." Id. (emphasis added). But, Crosley found that subsection (b) of section 3009 gave recipients of unordered goods "the right to keep those gifts" and that such language "implies the ability to enforce such a right." Id. As noted by the Supreme Court, although "the failure of Congress expressly to consider a private remedy is not inevitably inconsistent with an intent on its part to make a remedy available ... [s]uch an intent may appear implicitly in the language or structure of the statute or the circumstances of its enactment." TAMA, 444 U.S. at 18. Crosley held that there is no intent to imply a private right of action in section 3009(a), but Congress' implicit intent to create a private right of action is found in the language of section 3009(b) which created a "right."

Oxmoor's strongest argument in opposition to implying a private right of action is that, in essence, subsection (a) and (b) of section 3009 should not be considered separately from another or from the context of related provisions of law. "In determining the legislative intent, we follow the cardinal rule that a statute is to be read as a whole, since the meaning of statutory language depends on context." Chair King, Inc. v. Houston Cellular Corp., 131 F.3d 507, 511 (5th Cir. 1997). Defendant argues that when section 3009 is viewed as a whole and in the context of the enforcement powers accorded the FTC to address unfair trade practices, it is improper to infer that Congress intended private suits.

Section 3009 was enacted as part of the Postal Reorganization Act, Public Law 91-375, a statute relating to the Postal Service. In addition to promulgating section 3009, Public Law 91-375 authorized the Postal Service and the Attorney General to enforce certain violations of the Act. See e.g., 39 U.S.C. §§ 3005 (authority for

Postmaster to issue orders to regulate obtaining money under fraudulent pretenses), 3008(e) (providing for a civil action by the Attorney General to enforce violations of postal orders by prohibiting pandering advertisements) and 3011 (judicial enforcement by Attorney General of ban on mailing sexually explicit material). As noted, section 3009(a) makes, with noted exceptions, sending and attempting to collect payment for unordered merchandise a per se unfair method of competition or an unfair trade practice in violation of Title 15, United States Code, section 45(a)(1), a portion of the Federal Trade Commission Act.

Although "the Supreme Court and this circuit have focused on the 'right- or duty-creating language of the statute' as 'the most accurate indicator of the propriety of implication of a cause of action," Hondo Nat'l Bank, 696 F.2d at 1099 (citations omitted), and although subsection (b) of section 3009 affords a consumer the "right" to treat unordered merchandise as a gift, the "focus" of section 3009 appears to be more "on the person regulated rather than the individuals protected," Alexander v. Sandoval, 532 U.S. 275, 289 (2001), that is, the purpose of the laws is to stop the practice of shipping and trying to collect payment for unordered merchandise. Congress' express reference to section 45(a) in section 3009(a) is strong support for the conclusion that Congress understood and intended that section 3009 was considered in reference to section 45(a) and that enforcement of section 3009 would be addressed by the Federal Trade Commission through authorities granted it to address unfair trade practices in violation of section 45(a). Other related statutory provisions accorded the Federal Trade Commission the authority to address unfair methods of competition and unfair trade practices. These "integrated civil enforcement provisions . . . provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly." Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 146 (1985) (no private cause of action by which beneficiary of employee benefit plan could recover extra-contractual compensatory or punitive damages for fiduciary's improper or untimely processing of claim); Sigmon, 110 F.3d at 1206 ("We have held that the 'existence of [an] administrative scheme of enforcement is strong evidence that Congress intended the administrative remedy to be exclusive.'") (citations omitted).

The remedial scheme for unfair trade practices in violation of section 45(a) included, at the time of the enactment of section 3009, the power of the Federal Trade Commission to issue cease and desist orders, conduct investigations, act as a master in chancery to report to a federal court the relief to be ordered in an antitrust lawsuit, obtain records and testimony, participate in lawsuits in federal court, and enact rules. 15 U.S.C. §§ 45, 46, 46a, 47, 48, 49, 50, 56 and 57a. "The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." Alexander, 532 U.S. at 290. There is no indication from the statutory framework that Congress intended to create any

private right of action of any unfair trade practice in violation of section 45(a). At the time of the enactment of section 3009, courts had held that a violation of section 45(a) did not give rise to a private right of action. E.g., FTC v. Klesner, 280 U.S. 19 (1929). (Courts continued to maintain that there is no private right of action under section 45.) E.g., Holloway v. Bristol-Meyers Corp., 485 F.2d 986, 998 (D.D.C. 1973) (private enforcement of FTC Act would interfere with the FTC's enforcement of the act); Fulton v. Hecht, 580 F.2d 1243, 1248 n.2 (5th Cir. 1978), cert. denied, 440 U.S. 981 (1979); Whims Appliance Service, Inc. v. General Motors Corp., 1978 WL 1352 (N.D. Ohio, June 8, 1998) (same). Congress is presumed to know the state of the law at the time of enactment of section 3009, Miles v. Apex Marine, 498 U.S. 19 (1970) ("We assume that Congress is aware of existing law when it passes legislation."); see Cannon v. University of Chicago, 441 U.S. 677, 696-697 (1979) ("There is no recovery for loss of society in a Jones Act death action."); Hondo Nat'l Bank, 696 F.2d at 1098, including that Congress has passed other statutes that gave the FTC significant enforcement powers and that a violation of the Federal Trade Commission Act did not give rise to a private right of action in federal court.

"It is also an 'elemental canon' of statutory construction that where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies. Chair King, 131 F.3d at 512. The Supreme Court has stated:

> In determining whether a private cause of action is implicit in a federal regulatory scheme when the statute by its terms is silent on that issue, the initial focus must be on the state of the law at the time the legislation was enacted. More precisely, we must examine Congress' perception of the law that it was shaping or reshaping. When Congress enacts new legislation, the question is whether Congress intended to create a private remedy as a supplement to the expressed enforcement provisions of the statute.

Hondo Nat'l Bank, 696 F.2d at 1098-99 (quoting Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 102 S. Ct. 1825, 1839 (1982)). As noted, Congress has provided remedies for unfair trade practices in violation of section 45 and the state of the law at the time section 3009 was enacted indicates that there is no private right of action under 45(a). Congress would be expected to know that collection efforts - legal proceedings to collect bills or to clear credit - generally proceed in state court. For the same reasons that the Supreme Court in TAMA declined to imply a right of action to seek recourse for the "prohibited acts" listed

in section 209 of the IAA (such as fraudulent transactions),[6] the Court should decline to imply a right of action to seek recourse under section 3009. In this case, in 1997, when plaintiff alleges she received the first book she ordered, plaintiff could have complained to the Federal Trade Commission, which, under the authority of section 45(a) and related provisions, would have authority to conduct an investigation, enter a cease and desist order, or file a civil suit to seek "recission or reformation of contracts, the refund of money or return of property, the payment of damages and other relief". 15 U.S.C. §§ 45, 46, 57b.

A decision of the United States Supreme Court entered after the ruling in Crosley, Alexander v. Sandoval, provides further support for the view that Congress' decision to provide some remedies makes it more difficult to conclude that Congress impliedly intended to provide other remedies. Alexander v. Sandoval, 532 U.S. 275 (2001). The Court in Alexander considered whether there was a private right of action to enforce disparate impact regulations promulgated under Title VI of the Civil Rights Act of 1964. The Court reviewed the standards for implying private rights of action, reiterating that whether a private right of action is "necessary to make effective the congressional purpose" or is consistent with the congressional purpose are not proper benchmarks. Id. at 287 ("Having sworn off the habit of venturing beyond Congress' intent, we will not accept respondents' invitation to have one last drink"). "Raising up causes of action where a statute has not created them may be the proper function for common-law courts, but not for federal tribunals." Id. The Court reiterated that statutory intent "is determinative" and considered the words of the statute at issue as well as the "text and structure of Title VI." Id. at 286, 288. The Court recognized that "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others," and held there was no evidence in that case that Congress had intended to create a private right to enforce a regulation promulgated under the statute." Id. at 290.[7]

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[6] The Supreme Court in TAMA implied a private right of action under section 215 of the IAA to seek a declaration, recision, restitution and injunction that an "investment advisory contract," as defined by 15 U.S.C. § 80b-5, or investment contract entered into in violation of the subchapter was void under section 215. 444 U.S. at 18-19. "Investment advisors" are required to be registered with the SEC. The Court set out provisions of section 209, which allow only a criminal prosecution by the Department of Justice or a civil suit for injunctive relief by the SEC, finding that the statutory language of section 215 "fairly implies a right to specific and limited relief in federal court" to have "the issue of voidness under its criteria ... litigated somewhere." 444 U.S. at 18. At the same time, the Court did not imply a private right of action for money damages under section 206 which would have authorized private suits for a list of prohibited transactions (such as, employing a scheme to defraud a client), finding it "highly improbable that 'Congress absentmindedly forgot to mention it intended a private action'" when, in section 209, it limited the remedies to action by the SEC or the Attorney General. 444 U.S. at 20. Unlike the situation in TAMA, § 3009 reverses the statutory presumption in contract law that one who possesses or exercises dominion over goods is liable to pay for them.

[7] To the extent that plaintiff's first amended complaint cites the FTC's regulation regarding "use of prenotification negative option plans," 16 C.F.R. § 425.1, alleges that Oxmoor's conduct "violate[s] section 425.1 ... of the Negative Option Rule," docket no. 10 at 18-19, and seeks to rely on an administrative rule in pressing this case, plaintiff has not demonstrated that Congress, through the statutory text of section 3009, created a private right of

> In sum, if the District Court decides not to follow Crosley, it would do so based upon its conclusion that there is no evidence that Congress intended to imply a private right of action, even though such remedy would be consistent with the general goals of stopping merchants from attempting to collect payment for unordered merchandise.[8]
>
> With respect to plaintiff's request for injunctive relief to restrain Oxmoor "from collecting or attempting to collect debts from the class members who have been sent unordered books," this Court is acting without precedent directly on point. Defendant argues that a private right of action - whether for restitution or injunctive relief - should not be implied; neither defendant nor plaintiff separately focus on injunctive relief in their briefs to the Court. In Kipperman, the Ninth Circuit held that "[i]njunctive relief ... possibly would interfere with the Federal Trade Commission's power to enforce section 3009" and that, "[i]n the absence of an expression on the part of Congress indicating a willingness to incur the risk of this interference, we hold that the private right of action does not embrace an injunction which enjoins the sender's activities." Kipperman v. Academy Life Ins. Co., 554 F.2d 377, 380 (9th Cir. 1977).[9] Therefore, focusing on legislative intent, the Ninth Circuit found no implied cause of action to sue for injunctive relief.

Report and Recommendation of the United States Magistrate Judge, pages 17-26 (docket #21), issued July 18, 2002) (citations removed from footnotes and placed into text; footnotes modified to reflect full cites as needed and to omit parallel cites were no longer necessary).

The Magistrate Judge explained further that if this Court decides there is no private right of action to sue in federal court under section 3009, then plaintiff's request for injunctive relief should be granted as well. The rationale for this holding was presented as follows:

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action to enforce any FTC regulation, including section 425.1.

[8] If the Court were to conclude there was not "affirmative legislative intent" to imply a private right of action, as in Noe, 644 F.2d at 437, the court would not be "required to make such multi-stepped analysis" as addressed in Cort, but it would not make a difference, since without evidence of legislative intent to imply a private right of action, the Court may not imply a private right of action.

[9] The Court held that "[i]n order to protect fully the recipients rights, he must be able to bring a suit to obtain a judicial declaration of those rights and, when necessary to secure restitutionary relief." The Court did not explain why possible interference with the FTC's power to enforce section 3009 applied only to limit an injunction but not restitution.

> For the same reasons as discussed above and not re-stated here, Congress expressly provided that, with two exceptions, sending "unordered merchandise" is an unfair trade practice in violation of section 45(a). Congress is presumed to know: the scope of the enforcement powers it had granted in the FTC in related provisions, including the power to regulate, investigate, and address unfair trade practices; that it had not provided for a private cause of action to enforce section 45(a); that courts had declined to imply a private right of action to enforce section 45(a). The issue is not whether a private individual's lawsuit to enjoin attempts to collect payment for unordered merchandise considered a "gift" would be consistent with congressional purposes; the issue is whether Congress impliedly intended to create a remedy to allow a private person to seek to enjoin collection efforts in federal court. Plaintiff has not born[e] her "heavy burden" to show that Congress impliedly intended to create a private right of action to seek an injunction. Based on the Supreme Court precedent discussed herein, if a private individual wishes an injunction against an unfair trade practice as defined in section 3009, the individual must seek recourse with the FTC or pursue any other available federal or state court remedies.

Report and Recommendation of United States Magistrate Judge, pages 27-28.

The Court has reviewed the defendant's objections and has conducted a de novo review of the Magistrate Judge's Report and Recommendation and finds the defendant's objections to the Magistrate Judge's Recommendation have merit to the extent they ask this Court not to follow the Crosley decision. Therefore, this Court hereby accepts, approves, and adopts the Magistrate Judge's factual findings and legal conclusions contained in the Report and Recommendation (i.e. the alternative analysis) and quoted above which provide support for finding no provide right of action is implied under section 3009. That portion of the Report and Recommendation shall therefore be accepted pursuant to 28 U.S.C. § 636(b)(1) such that defendant's motion to dismiss (docket #14) should be granted and plaintiff's motion for a hearing on the motion to dismiss (docket #16) should be denied. The Court also finds that in light of the above ruling, the pending motion for class certification (docket #5) should also be denied as moot.[10]

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[10] The Court is aware the Report and Recommendation also addresses plaintiff's alternative motion for leave to amend her complaint (docket #16). That motion will be addressed in a separate order.

Accordingly, it is hereby ORDERED that the Report and Recommendation of the United States Magistrate Judge, filed in this case on July 18, 2002 (docket #21), is ACCEPTED IN PART such that defendant's motion to dismiss (docket #14) is GRANTED, plaintiff's motion for a hearing on the motion to dismiss (docket #16) is DENIED, and plaintiff's motion for class certification (docket #5) is DENIED as moot.

It is so ORDERED.

SIGNED this 30th day of September, 2002.

FRED BIERY
UNITED STATES DISTRICT JUDGE